Supreme Court, U.S.
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92-1976

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

JORGE ORTIZ, JR.,

Petitioner,

v.

CRAIG DIETER and
JAMES BOWSER,

Respondents.

For Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Third Circuit

BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Does Petitioner's Petition for Writ of Certiorari fail to set forth appropriate grounds for review by this Honorable Court, as Petitioner fails to cite any conflict in the Circuit Court's decision with existing law in other Circuits, or in the Commonwealth of Pennsylvania?

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STATEMENT OF THE CASE

Petitioner filed a Complaint against the Respondents in Federal Court for the Eastern District of Pennsylvania, alleging a violation of his Civil Rights, citing 42 U.S.C. Section 1983. Trial was held before The Honorable Daniel H. Huyett, III, and a jury verdict was rendered on July 2, 1992, in favor of the Respondents. A civil Judgment was entered on the verdict on July 8, 1992.

Petitioner filed a Motion for Judgment Notwithstanding the Verdict pursuant to Federal Rule of Civil Procedure 50(b). By Order of August 3, 1992, per The Honorable Daniel H. Huyett, III, the Motion was denied, and the Order was filed of record on August 6, 1992.

Petitioner filed an Appeal to the United States Court of Appeals for

the Third Circuit. Circuit Judges Stapleton, Roth, and Lewis affirmed the Judgment of the Trial Court.

Petitioner timely filed the within Petition for Writ of Certiorari.

STATEMENT OF FACTS

The Complaint arose from an incident that occurred in the City of Allentown between Petitioner and Respondents, Officers Dieter and Bowser of the Allentown Police Department.

The City of Allentown Communications Center dispatched the description of two Hispanic males to its police officers, indicating that they were carrying lethal weapons. The following facts were dispatched:

A. Premises - 331 North Second Street, Allentown;

B. Two Hispanic males;

C. One Hispanic male in white; one in brown pants with no shirt;

D. One carrying a sawed off shotgun;

E. One carrying a long gun.

The dispatcher identified the two subjects by race, physical description, and location. Upon these facts Officers Dieter and Bowser independently proceeded to the area of 331 North Second Street.

Officer Dieter arrived at the area in which this incident occurred before Officer Bowser. When Officer Dieter arrived, the Petitioner walked away from him, and did not obey his commands that the Petitioner stop and raise his hands. In fact, according to Officer Dieter, Petitioner was outright uncooperative.

The two officers, in the course of their investigation, and in response to the Petitioner's uncooperativeness, asked the Petitioner to place his hands upon a wall, to conduct a search for weapons. As the officers began their

search, the Petitioner made a threatening gesture towards his belt, that reasonably appeared to the officers to be a move for a weapon. The plaintiff was restrained by Officer Bowser, and taken to the ground.

He was handcuffed and removed to a patrol car. After being identified and checked for outstanding warrants, Petitioner was released.

The Respondents prevailed at trial. Therefore, all of the evidence adduced at trial must be construed in a light most favorable to the Respondents.

ARGUMENT

Petitioner's Petition for Writ of Certiorari factually and legally mischaracterizes the issues in this case. Legally, he cites Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2nd 723 (1964), Spinelli v. U.S., 393 U.S. 410, 89 S.Ct. 384, 21 L.Ed. 2nd 723, (1964), and Draper v. U.S., 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2nd 327 (1959). All of these cases are search warrant cases. They involve the quality and quantity of information that must be obtained by an issuing authority to substantiate probable cause for issuing a search warrant.

The within case involves a warrantless arrest. The Jury found that the Petitioner was arrested. The question is whether the officers had

probable cause to effect the arrest. The within case, therefore, is legally inapposite to the cases cited by the Petitioner.

The Petitioner cites as his reason for allowance of the Writ of Certiorari, that the Circuit Court of Appeals rendered a decision in conflict with another Federal Court of Appeals decision on the same matter. There is, however, no Federal Court opinion cited by the Petitioner that addresses the issues in this case.

All of the cases cited by the Petitioner are search warrant cases. The issues in Aguilar and Spinelli were whether a search warrant may be issued by an issuing authority based upon uncorroborated "tips". The Supreme Court addressed the decision making of an

issuing authority, not police officers in the field, who must make split-second decisions for the protection of themselves and the community. The issuing authority is not confronted with these factors in its decision to issue a search warrant. The decisions cited by the Petitioner, therefore, are not in conflict with the decision rendered by the Court of Appeals in the instinct case, as they are search warrant cases, not warrantless arrest cases.

Moreover, the Petitioner misstates the factual foundation upon which the Jury's decision was rendered. Petitioner characterizes the arrest as being based solely upon the information received by the Allentown Communications Center. Petitioner appears to argue that an arrest was effected immediately upon

Officer Dieter approaching the Petitioner on the street. That is not the factual record upon which the Jury based its decision.

The Jury was presented with a sequence of events beginning with the call to the Allentown Communications Center, that resulted in a legitimate stop pursuant to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2nd 889 (1968). Only after the Petitioner threatened the officers and public at large did the officers make a decision under the circumstances facing them that the Petitioner would have to be detained. Even so, he was detained for only a short period of time until he could be identified.

None of the cases cited by the Petitioner present factual circumstances

even remotely similar to that which is presented in the within case. Not only are those cases search warrant cases, they are not cases that involve Terry stops resulting in arrest as a result of the Petitioner's threatening actions, and the decisions of police officers in exigent circumstances.

The Petitioner, therefore, has not presented a conflict in decisional law that would warrant review by the Supreme Court. The factual and legal bases upon which the decisions of the Court of Appeals, Trial Court, and Jury were made are not in conflict with any opinions rendered by the United States Supreme Court, other Circuit Courts of Appeals, or by the Pennsylvania Supreme Court. As there is no conflict, there is no necessity for review by the United

States Supreme Court. As there is no necessity for review, the Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

CONCLUSION

The Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FONZONE AND ASHLEY

By: _____

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